Subcommittee on Coast Guard and Maritime Transportation
Of The U.S. House Committee on
Transportation and Infrastructure
Hearing on
Foreign Vessel Operations in the
U.S. Exclusive Economic Zone

Testimony by
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June 17, 2010

Background

The Offshore Marine Service Association (OMSA) is the national trade association for the U.S. flag vessels that provide services for the offshore energy sector. Our industry was born more than 60 years ago, when the first offshore drilling started off the Coast of Louisiana. Local fishermen first used their vessels to meet the need of the new offshore oil industry. Today, the most sophisticated vessels in the world are run by the sons and grandsons of those pioneers. OMSA members own the workboats and crewboats that carry the cargo and personnel to offshore rigs and platform. Now as the country looks to alternative energy sources, such as wind and hydropower, our members are working to build the vessels that will meet the needs of these new and exciting projects. In the interests of clarity, we do not operate drilling vessels. That is a very different type of vessel involving very different operational concerns.

OMSA's members designed and constructed the vessels that work offshore, then they shared their knowledge with the world. The United States still has the largest fleet of offshore energy vessels in the world, but as I will explain, our leading role has been diminished greatly and our future is threatened.

Inspection and Safety

OMSA member vessels are U.S. flag vessels with coastwise endorsements. This means that the vessels are owned by Americans, crewed by Americans and built in American shipyards. OMSA member vessels are regulated to a high degree by the U.S. Coast Guard. Our Offshore Supply Vessels (OSVs), crewboats and utility vessels are inspected by the Coast Guard. Our mariners are trained under strict regulatory guidelines and credentialed by the Coast Guard. We meet requirements for Coast Guard-approved security plans. Our vessel discharge plans are approved by the EPA, and OMSA took a leading role in developing best practices in order to meet the requirements for vessels under the Clean Water Act.

The legal and regulatory framework that we work under has served us well, especially from a safety standpoint. Each year, OMSA surveys its members on their safety record, specifically lost time injuries on board our vessels. To our mind that is the most important standard of safety because it determines whether mariners will go home safe and uninjured at the end of their hitch offshore. Year after year, the personal injury rate for offshore vessels, based on an OSHA standard, is roughly one tenth the average for all American workplaces, on shore or at sea. That means that statistically, working on our vessels is safer than working in a restaurant, in a hotel or in an office, safer than almost every workplace in America. Our record on environmental stewardship is also good. According to Coast Guard data, from 2002 to 2008, offshore supply vessels were only responsible for one oil spill that would meet the criteria of a "serious marine casualty." While any spill or any spill is one too many, we believe we have a record we can take pride in.

While OMSA members want to operate U.S. flag vessels, it must be recognized that it costs money to fly the U.S. flag. It is a commitment to comply with the laws of the United States on safety, environmental protection and security, to pay American-level wages and to pay American taxes. In addition, the vessels we operate are built in American shipyards which must also comply with all of our laws and wage scales as well. All of those requirements potentially place us at an economic disadvantage to foreign vessels, which do not have to meet those requirements. These foreign vessels generally take advantage of the lowest cost and lowest standard available in the world.

The Jones Act

In return for a commitment to comply with U.S. laws, our vessels are protected by our Country's cabotage laws. Cabotage laws are common around the world. Our cabotage laws are popularly referred to as the Jones Act, which states that merchandise and passengers may only be carried between U.S. points on vessels that bear a U.S. flag and a coastwise endorsements.

The Jones Act gives us the ability to operate in this Country without being undercut by foreign vessels that do not have to meet our laws and regulations. What does the United States get out of the Jones Act? In the case of the OMSA membership, more than 100,000 American households rely on our sector for their livelihoods. For every mariner who works on the water, there are roughly nine shoreside jobs that support vessel operations. According to a study of the offshore vessel market, our industry is responsible for $18 billion in annual economic activity in this country. OMSA members generate $4.6 billion in annual wages and more than $2 billion in taxes.

Our sector of the maritime industry also supports a thriving shipbuilding industry in the United States. Between 2007 and 2009, American shipyards built more than 260 new vessels that can work in our offshore markets. Significantly, many of those shipyards also build military vessels to meet the new littoral defense and homeland security needs of our nation. The government and commercial vessel construction programs work together to allow our shipyards to maintain an experienced, skilled workforce, and to build expertise for our nation's needs.

We also should not forget that in the terrible minutes following the explosion of the Deepwater Horizon, it was an American crew on an American vessel that saved the lives of 115 rig workers. Throughout our history, we have seen examples of bravery and courage at sea. It is part of our national heritage. Let me suggest that the heroism of the crew of the Damon Bankston, returning time and time again into the flaming seas around the rig to rescue survivors, is now the latest chapter in that story. We should not allow the environmental disaster that followed the explosion to diminish their actions, and we should not assume for a moment that it was a foregone conclusion that the Damon Bankston would happen to be in the right place at the right time. One hundred and fifteen souls owe their lives to the American crew of that vessel.

Foreign Vessels in the Gulf of Mexico

Despite our great history, it is not a foregone conclusion that U.S. flag vessels will work in the Gulf of Mexico. We have become very concerned that the Jones Act is being significantly degraded and that the numbers of foreign vessels in the offshore energy sector is increasing. We find that many of these vessels are blatantly ignoring the Jones Act. Worse, we find that the Agency charged with enforcing the Jones Act – Customs and Border Protection ("CBP") in the Department of Homeland Security ("DHS") - has failed to live up to its responsibilities to enforce the law and to interpret the law as Congress intended. Because of this, to a large extent, American vessels are being written out of the script for the future of our offshore energy policy.

Two years ago we hired a full time investigator to track foreign vessels in the offshore energy sector. Based on his efforts, today we believe there are 85 foreign vessels working in our offshore energy sector on a regular basis. An additional 60 foreign vessels have worked in the Gulf in the last few months, but have since departed for other markets. These vessels are involved in a variety of activities.

Some are drilling vessels, which are allowed by law since they do not transport merchandise, and as stated earlier, are not a part of *our* maritime sector. However, the rest compete directly with our members.

As we have investigated these vessels, we have found that CBP and the Coast Guard lack the tools to adequately track them or even hold them to compliance standards that are significantly below those of U.S. vessels. In fact, DHS does not even have a means of figuring out where foreign vessels are in our offshore waters or what they are doing. Four years ago, Congress recognized this security lapse, and as a part of the SAFE Port Act, directed the Coast Guard to require foreign vessels to report their location and purpose when they work in our offshore waters. In fact, Congress gave the Coast Guard 180 days to develop those regulations. Yet today, DHS has not finalized those regulations and has been unresponsive to our numerous requests as to the status of the regulations. In other words, when it comes to foreign vessels in our offshore, our government still has no idea what they are up to.

Violations are Commonplace

However, through our tracking efforts, OMSA has some idea. We have found that foreign vessels working in the Gulf routinely turn off their AIS transponders, equipment which they are required by law and international agreements to use for both safety and security reasons. Turning them off makes it harder to monitor their activities.

We have found numerous examples in which we believe foreign vessels have violated the Jones Act. In some cases, we have made formal complaints to CBP concerning these activities. In other cases, we have found evidence of potential violations which warranted further investigation. Generally we have found that field units have been willing to pursue these potential violations. The problem appears to be with CBP Headquarters, which has failed to support their field units with guidance or approval. Two of our complaints are more than a year old and have yet to see action. As with the offshore reporting requirements, DHS has been unresponsive to numerous requests on the status of the complaints.

Safety Concerns

Does this lack of oversight create safety concerns offshore? It is a reasonable question, but this lack of oversight itself makes it a hard question to answer. We do know that in 2005, a foreign vessel was detained by the Coast Guard for numerous safety violations, but only after it had been allowed to work in the Gulf of Mexico for five months, under the radar, unnoticed and unexamined.

We are also aware of one instance in 2006 in which a Panamanian flagged construction barge had a serious flooding incident due to crew error in opening a valve undergoing maintenance. Based on the Coast Guard investigation, it appears that the more than 300 workers on board were mustered on deck in case they needed to evacuate. The incident report indicates that there were improperly maintained water tight doors and cable penetrations causing adjacent rooms to also flood. These would be common inspection items for a U.S. flag vessel. The flooding occurred in 7100 feet of water approximately, 190 miles south of New Orleans. After the incident occurred, the vessel was moved and anchored 40 miles south of Fourchon, Louisiana, to begin repairs that were estimated at $20 million. It is hard to conceive of a U.S. flag vessel, placed in extremis, being allowed to continue to operate without being required to come into port for a thorough USCG examination, and being allowed to submit their required written casualty report over a month after the incident rather than the five day deadline under 46 CFR Part 4.

Tax Noncompliance

The last area of noncompliance concerns taxes. In numerous cases, our members have bid for work and found that foreign vessels were able to so substantially undercut their rates that it caused them to ask how the foreign vessels could turn a profit. Last year the IRS provided the answer. In October the IRS issued "Industry Director's Directive #1 - United States Outer Continental Shelf Activity." It said "Our analysis indicates that a significant number of foreign vessels permitted to work in the OCS do not comply with U.S. filing requirements."

The directive pointed out that activities in support of offshore energy projects are not eligible for the same tax exemptions as those available to international shipping. Further, it said that if foreign vessel owners and operators do not pay their taxes, the customer, frequently an oil and gas company must pay a 30 percent withholding to the IRS.

The agency followed up by writing to the owners of some 200 foreign vessels that have worked in U.S. waters to ask them to address their tax status. While we do not know how those owners responded, it gives some glimpse into the scope of the noncompliance by the foreign vessel fleet and the potential tax revenue being lost to our country.

Our understanding is that the IRS is now preparing a second directive that will address noncompliance with our laws on employee tax withholding by foreign vessel owners. For our vessel owners, it is no wonder their bids for offshore jobs are being undercut by foreign competitors who do not bother to pay corporate income taxes or to withhold employee payroll taxes for work done in our country's waters. For our American mariners, this represents a double penalty in lost work and in competition from foreign mariners who are not paying taxes on the wages they earn here.

Current Interpretations of the Jones Act

The last area I would like to discuss concerns the approach of the Department of Homeland Security and Customs and Border Protection to the Jones Act, which has served to undermine the law and the efforts of American companies to work in the offshore energy sector. For many years, we have been troubled that CBP has incorrectly interpreted the Jones Act as allowing foreign vessels to transport large items of cargo offshore for installation, on the theory that the installed items were the equipment of the vessel, not subject to the Jones Act, rather than merchandise which is subject to the Law. This came to a head in late 2008, when BP made a request to use a foreign vessel to transport a blowout preventer and valve structure, known as a Christmas Tree, to an offshore location. In its request, BP described the cargo as "equipment of the vessel." CBP provided BP with the requested ruling which would have enabled the use of a foreign vessel.

We challenged that ruling, pointing out that the blowout preventer/Christmas Tree would be installed at the oil well and left for the life of the production facility. In no sense was it equipment of the transporting vessel. In accordance with CBP's regulations governing reconsideration of past rulings, CBP agreed and withdrew the ruling. Then they reviewed a number of other interpretive rulings on the issue of what constituted merchandise, as distinct from equipment of the vessel, and found that they had a series of conflicting, confusing interpretations that had the effect of undermining the Congressional intent of the Jones Act. In July, 2009, CBP published a proposal to address these conflicting interpretations in a way that restored the clear meaning of the law.

This would have made the law clear in a way that industry and CBP field units would have understood. Members of this Committee were in the forefront of support and urging CBP to finalize the proposal at the earliest opportunity. It would have been a signal to our members that they could build sophisticated offshore construction and repair vessels with the assurance that the law would protect them as it was intended to do. I know, for example, that one of my members has blueprints for a new vessel worth roughly $80 million dollars, and he had been waiting for CBP to finalize its proposal before going ahead with construction.

Then an interesting thing happened. At the urging of opponents of the Jones Act and those who benefit by not having the laws properly interpreted, DHS told CBP to withdraw the proposal "for further review." CBP withdrew the proposal in mid-September, saying it would be reissued in the near future. Six months passed with no new proposal. Then on March 17th, over the strong objection of OMSA and others in the maritime community, rather than issuing a new proposal under the process proscribed by law and CBP regulations, DHS drafted an Advanced Notice of Proposed Rulemaking and submitted it to OMB for review. Utilizing the Advanced Notice process ensured that the issue will not be resolved for two years or more. Now as we understand it, the U.S. Trade Representative has raised concerns over using this process, potentially causing further delay or even an end to the process.

DHS has yet to explain why it chose this path or what it intends to do now, although we did receive a letter from DHS on June 4th commending us for our patience.

Implications for the Future

Finally, the government's posture with regard to foreign vessels working in our offshore areas is not just important to the current offshore oil and gas activities that are engaged in. It may also determine our future role in developing offshore wind and other alternative energy projects. There will be a need for specially built installation and maintenance vessels. One is under construction in Louisiana as we speak. However, U.S. owners need the assurance from our government that it will interpret and enforce the laws correctly and as Congress intended. Otherwise, businesses risk stranding millions of dollars in capital investment because the Government is unwilling to live up to their obligations.

Thank you for allowing OMSA to submit this statement.